United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original with affidavit of mailing

74-2248

To be argued by
LEWIS F. TESSER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2248

ECONOMIC OPPORTUNITY COMMISSION OF NASSAU COUNTY, INC.,

Appellant,

—against—

CASPAR WEINBERGER, individually and in his capacity as Secretary of the Department of Health, Education and Welfare; BERNICE BERNSTEIN, individually and in her capacity as Regional Director of the Department of Health, Education and Welfare, Region 2, SAUL ROSOFF, individually and in his capacity as Acting Director of the Office of Child Development of the Department of Health, Education and Welfare; JOSUE DIAZ, individually and in his capacity as Regional Program Director of the Office of Child Development of the Department of Health, Education and Welfare for Region 2, and LESTER MILLER, individually and in his capacity of Board Chairman of the Glen Cove Child Day Care Center, Inc.,

Federal Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR FEDERAL APPELLEES

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BRIEF FOR FEDERAL APPELLEES

Statement of Issues

1. Did the District Court err when it rejected appellant's claim that the administrative determination of HEW was arbitrary and capricious?

A. Was there substantial evidence to support the administrative findings of the appeal decided by the Department of Health, Education and Welfare? The court below answered in the affirmative.

B. Did the Department of Health, Education and Welfare have authority to decide the appeal in the absence of formally promulgated Regulations, but in the presence of fair, definite and timely notice specifying appellate procedures? The court below answered in the affirmative.

C. Did the Department of Health, Education and Welfare utilize proper procedures in the determination of the appeal, and, in the alternative, does the failure to follow any regulation, however immaterial and nonprejudicial, constitute arbitrary administrative action? The court below answered in the affirmative and negative, respectively.

II. Is the instant action moot? The court below did not address this issue.

Preliminary Statement

Plaintiff appeals from an order of the United States District Court for the Eastern District of New York (Mishler, *J.*) dated July 25, 1974, granting the motion of the defendants for summary judgment and dismissing the complaint. Plaintiff's complaint, brought pursuant to 42 U.S.C. § 2701 et seq., sought injunctive and declaratory relief enjoining the Secretary of Health, Education and Welfare from directly funding a Headstart program, and requiring that these same funds first be administered and appropriated by the plaintiff.

On this appeal, plaintiff-appellant contests the summary judgment because it contends that the trial judge erred in

holding that the Department of Health, Education and Welfare acted with authority and proper procedures and that the record supported the administrative action. The federal-appellees, in this brief, refute each contention of the appellant. In addition, appellees claim that there no longer exists a case or controversy because the instant action is now moot.

Statement of the Case

Plaintiff-appellant, the Economic Opportunity Commission of Nassau County, Inc. ("Appellant") is a Community Action Agency as defined by 42 U.S.C. § 2790 and is partly responsible for implementing the provisions of the Equal Opportunity Act of 1965 (DC, A. 111).* Section 222 of this Act provides for a number of special programs to "stimulate actions to meet or deal with critical needs or problems of the poor which are common to a number of communities" 42 U.S.C. § 2809(a). Among the special programs created was "Project Headstart." **

The defendant Lester Miller is the chairman of the Glen Cove Child Day Care Center (GCD), an organization operating a federally subsidized day care center in Glen Cove since 1965 and Project Headstart since 1967 (DC, A. 112). GCD has always received its federal funding from the Office of Economic Opportunity (OEO) and later from the Department of Health, Education and Welfare (HEW) when that agency assumed responsibility for Project Headstart. These funds were channeled through appellant until the instant dispute (DC, A. 112).

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* Memorandum of Decision and Order of the District Court (hereinafter referred to as "DC"). "A" followed by a number hereinafter represents pages in the Federal Appellee's Appendix.

** The purpose of Project Headstart is to provide "comprehensive health, nutritional, educational, social, and other services. . . ." 42 U.S.C. § 2809(a)(1).

In April 1972, appellant forwarded to HEW its application for refunding GCD and other Headstart programs for the 1972-73 fiscal year and represented that GCD would be the delegate agency for Glen Cove (DC, A. 113). The application was approved. In August 1972, for reasons, subsequently determined to be arbitrary, appellant abruptly informed GCD that they would henceforth receive no funds (DC, A. 114). GCD appealed the decision of appellant to HEW's Office of Child Development (OCD) pursuant to 42 U.S.C. § 2944. (This section provides for an appeal by any agency desiring to serve as a delegate agency and whose application is either rejected or not acted upon by its Community Action Agency, which, in this case, was appellant). On March 16, 1973, Josue E. Diaz, Regional Program Director of OCD, responded to the appeal and requested the following materials from GCD:

1. Copies of materials your Board submitted to E.O.C. of Nassau, Inc. in, and in connection with, your application (a copy of your budget application for funding as a delegate agency.)
2. A description of or copies of communications, written or oral, between your Board and E.O.C. of Nassau, Inc. Board concerning your application.
3. If it is your Board's position that the Grantee's failure to act on the application was arbitrary or unfair, please state the reason why your Board takes this position.
4. Any other facts and circumstances which your Board believes relevant to your Appeal (A. 30).

In response, GCD submitted the materials set forth at A. 31-A. 84. Diaz also wrote to appellant on March 16, 1973 directing it to hold the Headstart funds allocated to GCD for fiscal year 1972-73 in escrow pending the appeal and requested that appellant submit the following documents:

1. A description of, or copies of, any communications, written or oral, between the Glen Cove Child Day Care Center, Inc. Board and your Agency regarding their request for delegate Agency status.
2. The reasons why your Agency failed to act upon their application.
3. Any other facts and circumstances which your Agency believes to be relevant to the case (A. 4).

In response, appellant submitted only the materials set forth at A. 5-A. 25. Contrary to Diaz' request, appellant submitted no reasons for its action. It merely forwarded copies of the correspondence in its file. In August, 1973, after due deliberation, Diaz notified appellant of his finding that its failure to turn over the allocated federal funds to GCD was improper for the following reasons:

1. That the EOC of Nassau County, Inc. submitted an application for Program Year "G" (August 1, 1972 to July 31, 1973), which indicated that the OS 187 (Delegate Agency Summary Information) that the Glen Cove Child Day Care Center, Inc. would be the Delegate Agency operating the Head Start program in Glen Cove. The OCD never gave its approval for any change in the sponsorship or the operation of the Glen Cove program. The denial of refunding of the Glen Cove Agency is a violation of the work program approved for the EOC of Nassau County.
2. That the EOC of Nassau County did not provide the Glen Cove Child Day Care Center, Inc. a reasonable opportunity to correct the defects and deficiencies alleged nor did the grantee submit evidence that it provided appropriate technical assistance with respect to the correction of the alleged defects and deficiencies (A. 86-A. 87).

Thereafter, appellant protested the decision and requested a plenary review by Saul Rosoff, Acting Director of OCD (DC, A. 116). In October 1973, Rosoff informed the parties of the procedures to be utilized:

> As Acting Director, I will review the case and render a final decision to either sustain or not sustain the decision of your agency to deny refunding to GCCDCC. The basis for the decision will be a determination of the reasonableness and fairness with which EOC acted in denying refunding to GCCDCC. Unless it is found that EOC acted arbitrarily and unfairly, the decision to deny refunding will be sustained. In the event that the decision of EOC to deny refunding is not sustained, it will be possible, among other alternatives, for GCCDCC to submit an application to the New York Regional Office for consideration of direct funding as a Head Start grantee. Approval of such an application could result in an appropriate reduction of funds to EOC.
>
> The record in this case which I will be reviewing will consist of the following: (1) the written material submitted by EOC and GCCDCC which was forwarded by the New York Regional Office to each party as an enclosure to Mr. Diaz' letter of September 20; (2) any rebuttal to the written material of the other agency described in "1" which EOC or GCCDCC wishes to provide to me, but not later than October 25, 1973; (3) any additional information furnished in response to a specific request by the Acting Director, OCD.
>
> Should additional information be requested, there will be an exchange of the information with all parties with an additional period for rebuttal to the new material.
>
> Not later than 30 days following receipt of the entire record, a final decision will be made. In order to

> assist in the preparation of the response described in item "2" above, EOC and GCCDCC may have the assistance of legal counsel. A party which does not have an attorney acting in that capacity as a regular member of its staff or on a retainer arrangement, may, by action of its Board of Directors, so designate an attorney. Fees for such an attorney shall be reasonable and customary fees for the locality, but may not exceed $100.00 per day (A. 96-A. 97).

Neither appellant nor GCD submitted any additional materials (DC, A. 118). Rosoff rendered his decision on November 12, 1973 sustaining Diaz's findings:

> Please be advised that I concur with the views of the Regional Office and sustain its decision transmitted to you by letter dated August 30, 1973 from Mr. Josue E. Diaz, Regional Program Director for Child Development. It is my finding that the written record as submitted by your agency does not establish defects and deficiencies in the administration and operation of the GCCDCC as your agency appears to allege. It would follow that the denial of refunding of the GCCDCC by your agency would appear to be arbitrary.
>
> In the event that you do not wish to continue as grantee with respect to the GCCDCC, I will suggest that the Regional Office obtain an application for direct funding from the GCCDCC and that the funding of your agency adjusted accordingly (A. 98-A. 99).

Appellant, on March 11, 1974, was then informed that the funds held in escrow pending the appeal and the monies allocated, but never distributed, for the 1973-74 fiscal year would revert to OCD and that appellant's federal funding

for the current operating year would be correspondingly reduced (A. 100-A. 101).

Appellant then requested injunctive and declaratory relief from the United States District Court for the Eastern District of New York. In refusing that relief, the court held, *inter alia,* that: (1) Rosoff's authority to hear GCD's appeal was implicit in § 604 of the Equal Opportunity Act, 42 U.S.C. § 2944, notwithstanding the absence of formally promulgated regulations; (2) OCD had authority to fund GCD directly (DC, A. 127-128); (3) OCD did not fail to observe proper procedures (DC, A. 133); and (4) Rosoff's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law (DC, A. 135).

Summary of Argument

In two administrative appeals, HEW twice determined that appellant had acted arbitrarily when it suddenly denied funding to GCD after appellant had represented to OEO and HEW that GCD would be funded. Appellant now contends that HEW acted arbitrarily when it decided that appellant had acted arbitrarily. There are three bases to appellant's allegation.

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* Thus the monies allocated for the 1973-1974 fiscal year for the Headstart program in Glen Cove were never given to appellant for distribution. The monies allocated for the 1972-1973 fiscal year to the Headstart program in Glen Cove that were being held in escrow due to appellant's refusal to distribute the fund to GCD were released to appellant and their 1973-1974 grant was reduced by a corresponding amount. Accordingly, there was no "defunding" of appellant in the sense of monies given and subsequently withdrawn. Rather there was a denial of funds to the appellant that were allocated for the Headstart program in Glen Cove because appellant indicated that it would not give those funds to the Headstart program in Glen Cove.

First, appellant contends that GCD did not have sufficient parental participation and that appellant, therefore, did not act arbitrarily when it denied GCD funding. Appellant, however, has asserted this issue as if this appeal were a trial *de novo*. In this brief, appellee will show that the District Court properly found that HEW fully considered appellant's assertions of insufficient parental participation and rendered a fair decision based upon all submitted evidence.

Second, appellant contends that after HEW decided that appellant should fund GCD and appellant refused, it was wrongful for HEW to fund GCD directly. In other words, appellant asks this Court for relief already afforded it by HEW. In any event, appellee will show here that it was not wrongful to fund GCD directly.

Third, appellant apparently contends that HEW acted arbitrarily because of procedural irregularities. Appellee will show here that not only were there no irregularities but that even if there were, the alleged irregularities were both immaterial and nonprejudicial.

In addition, appellee will show that the instant action is now moot.

POINT I

The District Court properly rejected appellant's claim that the administrative determination of HEW was arbitrary and capricious.

A. There was substantial evidence to support the administrative finding of the appeal decided by HEW

Appellant has contended that HEW's decision that appellant had acted arbitrarily was itself arbitrary. In *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971), the Supreme Court explained the standard to be used by courts when reviewing administrative actions of the instant type:

> Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Utilizing this standard, the District Court determined that HEW's decision "was based upon a consideration of all the evidence submitted and did not constitute 'a clear error of judgment.'" (DC, A. 134).

In response to allegations that it had acted arbitrarily, appellant has claimed that it had failed to fund GCD for one reason: GCD's Policy Committee was improperly constituted in that it had insufficient parental participation (Appellant's Brief, 9). Appellant supports its claim, how-

ever, as if this appeal were a trial *de novo*. It is clear, however, that none of the material submitted for the administrative appeal, substantiated appellant's allegation. (DC, A. 134). On the other hand, GCD submitted materials indicating a good faith effect to comply with HEW guidelines on parental participation. For example, the letter dated February 10, 1971 (A. 68) states that parent members and five community members had been elected to the Policy Committee. The letter refers to the Policy Committee election of February 9, 1971 and lists the names of those elected officers of the Committee. These facts are further substantiated by the minutes of GCD (A. 45). Moreover, the make-up of the Policy Committee for the year 1972-1973 lists seven parent members and five community members (A. 79) and the Report of the joint meeting of the Parents' Group and the Policy Committee, dated May 11, 1972, indicates that the parents and the Policy Committee took an active role in the operation of GCD (A. 57-A. 58). The Report states that Ruby Spann, a parent and Chairwoman of the Policy Committee, raised the issue and took the initiative in forming five policy subcommittees. Furthermore, the Report indicated the parents' awareness of their own responsibility to GCD for the point was made that if parents did not volunteer for the subcommittees they would be appointed.

In the first appeal, Diaz found that: (1) appellant had acted in violation of its own work program; (2) appellant did not provide GCD a reasonable opportunity to correct the defect, if it existed; and (3) appellant did not provide assistance to help correct the alleged defect (A. 86). When that decision was appealed to Rosoff, he found that the record "does not establish defects and deficiencies in the administration and operation of the [GCD]" (A. 98).

When the documents submitted by both parties are compared, it cannot be said that Rosoff's decision was arbitrary and capricious. The record before Rosoff was the same as

the record before Diaz (letter of Rosoff, dated November 12, 1973 (A. 98-A. 99). Appellant was aware of the documents that had been filed by GCD, and though Mr. Rosoff gave both parties the opportunity to submit further evidence, appellant failed to provide any additional supportive evidence and failed to rebut any of GCD's evidence of compliance (DC, A. 118). Indeed, it would have been arbitrary to approve of appellant's actions in view of its failure to present any evidence supporting its allegations.

B. HEW had authority to decide the appeal

Appellant has alleged that: (1) the failure of HEW to formally promulgate Regulations concerning appeals bars the *ad hoc* consideration of any appeal (Appellant's Brief, Point III); and (2) HEW had no authority to grant the relief adjudicated in the appeal (Appellant's Brief, Point IV). The trial court found "both contentions to be without merit" (D.C. 17) and appellant has now contended that the trial court erred.

1. Ad hoc administrative relief

Section 604 of the Equal Opportunity Act, 42 U.S.C. § 2944, provides that:

> The Director shall prescribe procedures to assure that—(1) special notice of and an opportunity for a timely and expeditious appeal to the director is provided for an agency or organization which would like to serve as a delegate agency . . . and whose application to the . . . community action agency has been wholly or substantially rejected or has not been acted upon within a period of time deemed reasonable by the Director; . . . .

Appellant contends that the failure of the Director to formally promulgate Regulations constituted a bar to his determination of the appeal.

Notwithstanding appellant's allegation that procedures were not prescribed pursuant to § 2944, it is clear from the record that procedures were in fact prescribed for the determination of the administrative appeal. In his letter of October 11, 1973, Saul Rosoff, Acting Director of OCD set forth the procedures to be followed (A. 96-A. 97). Notice of these procedures was timely given to all parties to the appeal (DC, A. 117) and it is undisputed that the appeal was conducted in accordance with the announced procedures.

Moreover, even if the procedures set forth by Rosoff did not satisfy the requirements of § 2944, the District Court properly determined that the "power of the director to hear appeals is implicit in the statute and is not affected by the presence or absence of formally promulgated regulations". (DC, A. 127). A converse proposition, in effect, would deny administrative appellate relief to all agencies subject to arbitrary or capricious administrative action—the precise situation the statute sought to avoid.

2. Authority to enforce administrative decisions

The appellant also contends that HEW's direct funding of GCD was without authority. This contention is without merit.

The direct funding resulted after HEW decided the appeal in favor of GCD. Appellant's continued refusal to comply with the decision by funding GCD forced HEW to directly fund the Headstart program in Glen Cove. The authority to determine that the rejection of GCD as a delegate agency was wrongful (42 U.S.C. § 2944[1]) necessarily includes the authority to implement the decision. Thus, the authority to directly fund a delegate agency is necessarily ancillary to the authority to decide the appeal, particularly when the party responsible for routing the funds subsequently indicates that it will not comply with the result of the appeal. If it were otherwise, appellant

could effectively abrogate the right of administrative appeal, as it has tried to do in this case.

In addition, the authority to directly fund GCD can be found in the statute creating Headstart. 42 U.S.C. § 2809(a) provides that:

> Subject to such conditions as may be appropriate to assure effective and efficient administration, the Director may provide financial assistance to public or private non-profit agencies to carry on local projects initiated under such special programs; but he shall do so in a manner that will encourage, wherever feasible, the inclusion of the assisted projects in community action programs, with a view to minimizing possible duplication and promoting efficiencies in the use of common facilities and services, better assisting persons or families having a variety of needs, and otherwise securing from the funds committed the greatest possible impact in promoting family and individual self sufficiency.

Thus, direct funding is allowed by the statute and is authorized when funding through the Community action program is not "feasible" or where such funding could not effectively achieve the "objectives of the program." Here, where the community action agency (appellant) had refused to comply with an administrative decision requiring them to fund the Headstart program, the only feasible way to effectively achieve the objectives of the Headstart program, consistent with the decision rendered in the administrative appeal, was the direct funding of GCD.*

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* Appellant underscores the following language from 2809(a): "This authority shall be used only where the Director determines that the objectives sought could not be effectively achieved through the use of authorities under section 2808. . . ." Appellant's Brief, 28). It is clear, however, that this language refers to the Director's authority to "develop and carry on special programs. . . ." In other words, appellant has challenged HEW's authority to fund project Headstart, a proposition it clearly did not intend to allege.

C. HEW at all times utilized proper procedures in the determination of the appeal

Appellant has asserted two instances of alleged HEW failure to utilize proper procedures in the determination of the administrative appeal: (a) the failure to observe the procedures set forth in 42 U.S.C. § 2944(2) and (3); and (b) the failure of HEW to comply with OEO Instruction 6441-1. In effect, the appellant contends that HEW acted arbitrarily because of these procedural failures. It will be shown herein that: (1) proper procedures were utilized; and (2) assuming arguendo, that proper procedures were not utilized, the procedures used by HEW did not constitute arbitrary administrative action.

1. Proper procedures were utilized

a. The applicability of 42 U.S.C. § 2944(2) and (3)

§ 604(2) of the Equal Opportunity Act (42 U.S.C. § 2944(2)) provides that:

> [A]n application for refunding under § 2809 . . . [shall not be denied] unless the recipient agency has been given reasonable notice and opportunity to show cause why such action should not be taken . . . ;

and § 604(3) provides that:

> financial assistance . . . shall not be terminated for failure to comply with applicable terms and conditions unless the recipient agency has been afforded reasonable notice and opportunity for a full and fair hearing.

It appears to be appellant's contention that it has had an "application for refunding" denied because HEW adjudicated the appeal by directly funding GCD. In fact, HEW granted, not denied, appellant's application to fund

GCD for fiscal year 1972-1973. The appeal's effect was to ratify and enforce that application. Additionally, the following year's application (1973-74) by the appellant for funds was not denied; it was reduced * only by the amount that would give effect to the decision of Diaz, then currently on appeal to Rosoff. It is clear that § 2944(2) is inapplicable because the appellant has been continuously funded by HEW.

Assuming arguendo that § 2944(2) is applicable, the "notice and opportunity to show cause" requirements of the section have been satisfied. In the words of the District Court, "NCEOC however, had ample notice from both Diaz and Rosoff of the possibility that its grant might be reduced, and had ample opportunity to demonstrate to OCD why its Headstart funds should not be deobligated." (DC, A. 131). For example, on October 11, 1973, in the course of informing the parties of the procedures to be followed in the appeal that appellant had requested, Rosoff stated:

> In the event that the decision of EOC to deny refunding is not sustained, it will be possible, among other alternatives, for GCCDCC to submit an application to the New York Regional Office for consideration of direct funding as a Head Start grantee. Approval of such an application could result in an appropriate reduction of funds to EOC (A. 96).

An additional determination by HEW would have involved exactly the same issues and evidence. Further administrative action would have been superfluous and repetitive; indeed, it would have been wastetful. Thus, it is clear that even if § 2944(2) is applicable, appellant had its opportunity to show cause why the reduction should not have occurred.

* OEO Regulations treat a reduction as a denial if the application for refunding is reduced to 80 percent or less of the recipient's current level of operations. 45 C.F.R. § 1067.2-4(b). It is undisputed that appellant's level of operations was not reduced to 80 percent or less.

It also appears to be appellant's contention that financial assistance was "terminated for failure to comply with applicable terms and conditions. . . ." Thus, appellant argues that 42 U.S.C. § 2944(3) entitles it to a full and fair hearing. It is clear, however, that financial assistance was never "terminated". On the contrary, HEW ordered that the financial assistance be implemented in accordance with appellant's application. Moreover, even if it be alleged (although appellant has not done so) that the "termination" applies to the years following the year of the initial dispute, it is clear that appellant would then have lacked a "legitimate claim of entitlement." *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972). "The nature of an OEO grant is such that it is limited in time as well as amount. . . . Therefore, it is insupportable to suggest that the non-expenditure of funds vests a constitutionally protected property interest in those funds in the persons with a limited authority to expend them after that authority has lapsed by its own terms." *Mil-ka-ko Research & Development Corp.* v. *Office of Economic Opportunity,* 352 F. Supp. 169, 172 (D.D.C. 1972). Thus, since financial assistance was never "terminated", it is clear that 42 U.S.C. § 2944(3) is inapplicable.

The appellant has also contended that a meeting was required notwithstanding that the statutory provisions were inapplicable or may have been satisfied by documentary notice and opportunity to show cause. Appellant's contention is based on the following language of "paragraph C" of the OEO regulations:

> Before rejecting an application of a recipient for refunding or reducing the refunding within the meaning of paragraph (b) of this section, OEO shall offer the recipient an opportunity to submit written mate-

> rial and to meet informally with an OEO official to show cause why its application for refunding should not be rejected or reduced. 45 C.F.R. § 1067.2-4(c).

Appellant neglects, however, to cite paragraph (b) of the same section. Paragraph (b) states:

> The procedures set forth in paragraphs (c) through (g) of this section shall apply *only where an application for refunding* submitted by a current recipient is rejected or *is reduced to 80 percent* or less of the recipients current level of operations. . . . (Emphasis Added.)

It is undisputed that appellant's level of operations was not reduced to 80 percent or less.* Therefore, paragraph (c) is inapplicable.

Even if it be assumed that OEO regulations require a meeting, HEW is not bound by these regulations.** And

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* Appellant's current level of operation for its 1973-74 Headstart program alone was in excess of one million dollars. The monies earmarked for GCD, and those not delivered to appellant were less than eighty thousand dollars. See, e.g., letter dated March 11, 1974, A. 100-101).

** The memorandum of understanding relating to delegation of Project Headstart, July 6, 1973, states, in part, that:

4. DHEW shall have the authority to set Head Start performance criteria and to initiate and promulgate policies, regulations, guidelines, instructions, and issuances for the operation of Project Head Start. In carrying out Project Head Start, DHEW may follow or, subject to prior consultation with the Director of OEO, rescind, amend, modify, or otherwise change, in whole or in part, any applicable OEO instruction, regulation, issuance, or guideline as it deems necessary or appropriate.

5. Nothing in this Memorandum of Understanding shall be deemed to limit the Delegation of Authority referred to in the first paragraph hereof (A. 103).

On page 19 of its Brief, Appellant cites Paragraph A2(C) of a June 28, 1969 Memorandum of Understanding. That Memorandum, however, was not in effect at the time of the administrative appeal; it was superceded by the Memorandum of July 6, 1973.

even assuming that HEW is bound, the specific regulation applies only "when the assistance is administered by OEO." In the present situation, the assistance was administered by HEW and not OEO.

It is clear that no meeting was required, and that HEW did not fail to observe any requisite procedure set forth in 42 U.S.C. § 2944.

b. OEO Instruction 6441-1

Appellant also makes the claim (implicitly, somewhat inconsistently with its earlier contentions) that in the course of the appeal, HEW failed to comply with OEO Instruction 6441-1. However, the Instruction applies to financially assisted programs under Title II of the Economic Opportunity Act, only "if the assistance is administered by OEO." OEO Instruction 6441-1, A. 106. As stated previously, in the present situation, the assistance was administered by HEW. Even if it is assumed otherwise, HEW (in its Memorandum of Understanding with OEO) merely agreed that it "may follow" OEO instructions . . . "as it deems necessary or appropriate." (See DC, A. 133). Even in the most arbitrary situation, the Memorandum only suggests that OEO be consulted before its Rules were *changed.* There is no obligation to follow OEO Rules in any particular situation and it is clear that HEW was under no obligation to follow OEO Instruction 6441-1.

2. The alleged failures did not constitute arbitrary administrative action

Assuming arguendo, that HEW did not follow proper procedures because: (1) it did not promulgate Regulations covering appeals; or (2) this court determines that HEW failed its duty to observe procedures set forth in 42 U.S.C. § 2944; or (3) this court determines that HEW failed its duty to comply with OEO Instruction 6441-1; appellee

nevertheless contends that even if all three of the enumerated items were true, HEW did not act arbitrarily.

a.

The appellant has suffered no prejudice

The sum total of HEW's alleged failures amounts to: (1) there existed no formally promulgated Regulations (Appellant's Brief, Point II B); (2) there was no informal meeting (Appellant's Brief, Point IIA *viz a viz* 42 U.S.C. § 2944); (3) HEW did not consult with the Director of OEO (Appellant's Brief, Point IIA *viz a viz* OEO Instruction 6441-1).

Appellant made no claim in the District Court that it had been prejudiced by any of these alleged failures and in fact, there has been no prejudice. Although there were no formal regulations, written notice of the procedures, the evidence to be considered and the standard of review was provided to both parties and the notice has been made part of this Court's record. There has been no allegation that the procedures were unfair. Nor has there been an allegation that the procedures were not followed. The parties were given ample opportunity to submit materials and to object to proposed procedures. In sum, the procedures were fair, precise, plenary, timely and reviewable. Although there was no informal meeting, appellant was given the opportunity to submit material and rebuttal material and to make written agreements and rebuttals. When given this opportunity, appellant declined to submit additional material, argument or rebuttal to the final reviewing authority. (DC, A. 118). It would be incongruous to suggest that appellant was therefore prejudiced by the lack of an informal meeting. *Federal Communications Commission* v. *WJR,* 337 U.S. 265 (1949); *Pan American Petroleum* v. *Federal Power Commission,* 322 F.2d 999, 1005 (D.C. Cir. 1963). And certainly no prejudice occurred simply because HEW made no prior consultation with OEO. The proce-

dure was intended as a mere aid "to the exercise of the agency's independent discretion." *American Farm Lines* v. *Black Ball,* 397 U.S. 532, 539 (1970).

Thus, appellant has urged the Court to find that, notwithstanding appellant's failure to allege and show prejudice, insignificant procedural flaws constitute arbitrary administrative action. Although appellant alleges that the failure to follow procedures affected its substantial interests,* only the "decision" of HEW affected "EOC's planning and administrative function." But the procedures did not.** In effect, the appellant has asked the court to hold that any procedural failure is arbitrary action, however harmless or immaterial the failure. No court has ever so held.

It has been recognized that the use of *ad hoc* procedural rules is not fatal to an administrative determination absent prejudice to the complaining party. In *Sun Oil Co.* v. *F.P.C.,* 256 F.2d 233 (5th Cir. 1958), Sun Oil, as a member of a natural gas pooling arrangement, had been allowed to file rate schedules with F.P.C. It challenged the promulgation and retroactive application of an order which rescinded

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* Appellant cites three cases to support the proposition that where administrative action affects substantial interests the administrative agency is required to follow established procedures. The appellee does not contest this assertion. Appellee does refute appellant's contention that "in all [the] cases, arguably 'adequate procedures were followed." (Appellant's Brief, p. 23.) Without attempting to argue a negative proposition, appellee herewith asserts that none of the cases cited by appellant, *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Service* v. *Dulles,* 354 U.S. 363 (1957); and *Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954), involve a finding, or even an indication of adequate procedures. In fact, all involve a direct finding of material procedural inadequacy with concomitant prejudice.

** Appellant has raised the issue of the adequacy of the administrative findings (Appellant's Brief, 24-25) as the only other claim that its substantial interests were affected by a failure to follow procedures. This issue is discussed below, *infra,* at pp. 23-24.

former rate schedules and which refused to allow it to file new schedules. Its attack on the order because it was *ad hoc* was rejected by the court.

> . . . an administrative agency is not a slave of its rules. Ad hoc changes may be made and, in proper cases, may be applied retroactively. In a particular case an administrative agency may relax or modify its procedural rules and its action in so doing will not be subjected to judicial interference in the absence of a showing of injury or substantial prejudice. [Citations omitted] *Sun Oil Co.* v. *F.P.C., supra,* at 239.

Indeed, cases have even sustained the retroactive application of substantive rules to particular cases. See *S.E.C.* v. *Chenery Corp.,* 332 U.S. 194 (1947), *rehearing denied,* 332 U.S. 747 (1947).

The general rule is that it is always within the discretion of a court or an administrative agency:

> to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party. *NLRB* v. *Monsanto Chemical Co.,* 205 F.2d 763, 764 (8th Cir. 1953), cited in *American Farm Lines* v. *Black Ball,* 397 U.S. 532, 539 (1970).

In *American Farm Lines,* the United States Supreme Court ratified the general rule and held that the Interstate Commerce Commission did not act improperly even though it violated its own rules. In its brief, appellant cites cases that *American Farm Lines* expressly cited as exceptions to the rule. In those exceptional cases: (1) the violated rules

were intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion (*Vitarelli* v. *Seaton,* 359 U.S. 535 (1959) and (2) any agency required by rule to exercise independent discretion failed to do so. (*Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954); *Yellin* v. *United States,* 374 U.S. 109 (1962)). As in *American Farm Lines,* the instant action does not fall into either exceptional category. The rules that HEW allegedly violated (in one instance, for an informal meeting with appellant, in the other, for a consultation with OEO) were primarily intended to aid agency determinations. Moreover, all cases held to fall within the exceptions to the general rule involved situations where no procedural rules were followed. In those cases, administrative decisions had been made in a *clearly spurious and undeliberative manner.* Prejudice was obvious. In the instant case, there has been no such allegation. Both GCD and appellant went forward with the appeal conducted pursuant to procedures set forth in advance by Diaz and Rosoff in letters to the parties. These procedures were more than adequate to allow for a full and fair factfinding by OCD. Both appellant and GCD were given the opportunity to submit any and all material they considered relevant to support their positions. Following the preliminary determination by the Regional Office, both plaintiff and GCD were given the opportunity to submit "rebuttal" material. These procedures, as well as the standard of review and the right to have legal assistance, were set forth in the letter of Saul R. Rosoff of October 11, 1973. (DC, A. [illegible]118).

b.

The administrative findings were not inadequate

Assuming arguendo, that proper procedures were not utilized, it is clear that no procedural failure constituted arbitrary administrative action. Appellant, however, has raised the issue of the adequacy of the administrative findings.

There exists no statutory or regulatory requirement of findings in administrative determinations of the kind involved at present—such a requirement would hinder the flexible and timely manner in which administrative agencies must perform. Nevertheless, the instant case is certainly not deficient in providing a complete record for review. All relevant material is included in the record including a history of administrative actions and the reasons for those actions.

From the record, it is clear that both administrative decision makers (Diaz and Rosoff) made findings in a reasonable manner. They both gave notice of the materials they would consider and they requested to be given any other materials the parties thought relevant. It was the appellant who requested the appeal to Rosoff, claiming deficiencies on the part of GCD. Rosoff concluded that the record "does not establish defects and deficiencies" that had been alleged. Additionally, Diaz has provided precise findings for HEW's determination that appellant acted arbitrarily. They were that (a) appellant violated the work program approved for the appellant because OCD never gave approval to the change in the sponsorship or operation of the Glen Cove program; (b) appellant did not provide reasonable opportunity to correct any deficiencies; and (c) appellant did not render technical assistance in order to correct the alleged deficiencies. (DC, A. 115-116).

It is obvious that at all levels, plenary records were kept and that there is a detailed record of all administrative determinations and supporting materials. HEW's administrative appellate procedures were at all times reasonable and fair. They were never arbitrary.

POINT II

The appeal is moot.

This appeal is moot because there is no longer any case or controversy to be resolved.

Funding for Headstart programs is done on a year-to-year basis, commencing August 1st of each calendar year. For fiscal year 1972-73 appellant had applied for and been granted funds for GCD to run a Headstart program in Glen Cove. Subsequently appellant withheld those allocated funds from GCD and the administrative appeal was taken. During the pendency of the appeal, appellant, in its application for funds for fiscal years 1973-74, sought funds for a different organization to run a Headstart program in Glen Cove. This application was rejected.

In its application for funds for fiscal year 1974-75 appellant again applied for funds for an organization other than GCD to run a Headstart program in Glen Cove. This application has been rejected.

The appeal herein is moot because no effective relief can be rendered as a result of the underlying lawsuit. *United States* v. *W. T. Grant,* 345 U.S. 629 (1953). Fiscal years 1972-73 and 1973-74 have passed. The Headstart programs for those years are completed and finished. Appellant spent no money for a Headstart program in Glen Cove for those years and no funds can now be allocated for those years. The instant action has no bearing on the current fiscal year's funds (A. 147). No appeal, either administrative or judicial has been taken from HEW's denial for the current fiscal year.

Even if the court below or this court were to find that the federal agency erred in its past decisions, this would not entitle appellant to funding—either for past years or

for the current fiscal year. Present funding requires a review of appellant's proposed sponsor to determine if it meets all federal requirements, a task best left to the administrative expertise of the Office of Child Development. This has been done. Moreover, there is no subject matter on which this appeal may act. A decision on the merits of this appeal would be purely advisory.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

Dated: January 2, 1975

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